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In the Supreme Court of the United States

OCTOBER TERM, 1967

CORRAL SPORTSWEAR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1094

CORRAL SPORTSWEAR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. A–1—A–9) is reported at 383 F. 2d 961. The Board's Decision and Order in the unfair labor practice proceeding (Pet A–17—A–29) are reported at 156 NLRB 436. The underlying representation decision is set forth at Pet. A–13—A–16.

JURISDICTION

The court of appeals entered its judgment on October 4, 1967 (Pet. A–1—A–11). A timely petition for rehearing was denied on November 15, 1967 (Pet.

292-950—68

A–12). The petition for a writ of certiorari was filed on February 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly declined to entertain the employer's post-election challenges to the ballots of four employees who were permitted to vote without challenge in a Board representation election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in Appendix G to the petition (pp. A–30—A–34).

STATEMENT

In August 1964, Local 670, International Union of Operating Engineers, AFL–CIO, petitioned the Board for a representation election among the production and maintenance employees of the Corral Sportswear Company. The Union and the Company subsequently stipulated, with Board approval, to the holding of a representation election within the unit requested (Pet. A–20). The Company thereupon submitted a list of its employees, from which the parties excluded individuals they agreed were supervisors, leaving an eligibility list of 76 employees, including 6 employees designated as "linegirls" [1] (R. 392; 374–377).

[1] Linegirls worked with the seamstresses in petitioner's garment plant, but did no actual sewing themselves. They were responsible for effectuating an efficient flow of cut cloth through the four lines of seamstresses (R. 391; 27–29, 228–229, 374–377). They inspected and corrected the work as it moved along the

The Union won the election, 36 to 35 (Pet. A–20). At the election, however, the Union challenged the ballots of four employees, including two of the linegirls, Roberts and Heartsill, who it contended were supervisors, and the Company challenged the ballot of Pat Wilson, a set-up department employee, on the ground that she, too, was a supervisor. At that time, the Company did not challenge the eligibility of the other four linegirls (Pet. A–6–A–7). Since the challenges were sufficient to affect the outcome of the election, the Board ordered a hearing on the challenges (R. 385–388).[2]

The hearing officer found that the two linegirls, Roberts and Heartsill, had sufficient authority to make them supervisors (Pet. A–31), and sustained the Union's challenges to their ballots (Pet. A–21; R. 397–400). He also sustained the Union's challenge to the two other ballots and the Company's challenge to the ballot of Pat Wilson (R. 400–402). The Company filed exceptions with the Board contending, *inter alia*, that Roberts and Heartsill were not supervisors, but that, if they were, then the ballots of the other four linegirls should also be invalidated (R. 413, 414). The Board overruled the Company's exceptions, sustained the hearing officer's findings, and certified the Union (Pet. A–15, A–21).

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line, and were generally responsible for ascertaining that each seamstress remained busy and that production was maintained (R. 397; 26–30, 57–61, 109, 172, 255–259, 325–326, 338–340, 363–364).

[2] "R." refers to the joint appendix filed in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Following the certification of the Union, the Company refused to bargain, and the Board's General Counsel issued an unfair labor practice complaint. The Company defended its refusal to bargain solely on the ground that the Union had been improperly certified, urging in particular that the Board had erred in not setting aside the election because the four linegirls had voted (Pet. A–22). The Board, noting that the four linegirls had not been challenged, held that the Company's contention was foreclosed under the Board's traditional policy, approved in *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, of not entertaining post-election challenges to voter eligibility (Pet. A–22, n. 5). Accordingly, the Board concluded that the Union had been properly certified, and that the Company had violated Section 8(a) (5) and (1) of the Act in refusing to bargain (Pet. A–23). The Board ordered the Company to bargain with the Union upon request, and to post the usual notices (Pet. A–25—A–29). The court of appeals enforced the Board's order in full (Pet. A–1—A–9).

ARGUMENT

The decision of the court of appeals involves a proper application of the principles approved by this Court in *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, to the special facts of this case. In *Tower*, this Court held that the Board's procedural rule prohibiting post-election challenges to ballots was "in accord with the principles which Congress indicated should be used in securing the fair and free

choice of collective bargaining representatives." 329 U.S. at 332. The Court noted that such a rule was particularly appropriate in Board representation cases, since post-election challenges would tend to encourage "undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results," invade the secrecy of the ballot, encourage deceit and trickery in the preparation of voting eligibility lists, and extend the atmosphere of animosity and strife often accompanying such elections beyond the closing of the polls. *Id.* at 331–332. The Court concluded that, although "cutting off the right to challenge" after the election "conceivably may result in the counting of some ineligible votes," this disadvantage was "far outweighed by the dangers attendant upon the allowance of [such] challenges." *Id.* at 331.

The Board's application of its rule barring post-election challenges in the instant case is entirely consistent with the principles enunciated in *Tower,* and creates no inequity. The Company, although well aware of the duties of the linegirls, considered them to be "employees" on the eligibility list which it furnished the Board, and, at the election, did not raise any question as to these four linegirls, even after the Union had specifically raised an issue with respect to the other two linegirls. Moreover, the Company's default in failing to challenge the four linegirls was not without significant consequences. Had the Company challenged those four people at the time of the election, their ballots could have been impounded so that

it could later have been determined whether or not their votes affected the election. By failing to challenge the four linegirls, petitioner allowed their votes to be commingled with those of the other qualified employees so that it is impossible to tell, without resort to extraneous evidence, whether they voted for or against the Union.

Contrary to petitioner's assertion (Pet. 8–9), the court below did not hold that the Federal Rules of Civil Procedure were controlling in Board representation proceedings. It merely drew on those rules by analogy, in noting that the Company, at the election, could have advanced "inconsistent positions as alternatives dependent upon a fact finding" (Pet. A–9, n. 8); *i.e.*, the Company could have argued that all of the linegirls were "employees," but, should the Board find that they were in fact supervisors, their ballots should not be counted. Indeed, the Company did make such an alternative argument at the post-election stage in its exceptions to the Board from the hearing officer's Report on Challenged Ballots (R. 413).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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